

The Indiana Prosecutor

Published by the
Indiana Prosecuting Attorneys
Council

June 2005

DIVERSION AND DEFERRAL GUIDELINES COMING

During this year's legislative session, significant changes were made to the statutes that regulate the collection and use of diversion and deferral fees. I.C. 33-37-8-4 and I.C. 33-37-8-6 were amended to permit funds derived from diversion and deferral programs to be used for only specified purposes. I.C. 33-37-8-6 lists nine uses for which these funds may now be expended. Further, 33-37-8-4(c) provides that the funds derived from deferral and diversion programs can only be used in accordance with guidelines adopted by the Prosecuting Attorneys Council.

The IPAC Diversion and Deferral Committee met on June 20, for the purpose of drafting the guidelines called for by the statute. The guidelines will be unveiled at the upcoming IPAC Summer Conference next week in Evansville. Copies of the guidelines will also be sent to each elected prosecutor.

Of importance to prosecutors, I.C. 33-39-1-8 specifically provides that after June 30, 2005, persons "arrested or charged" with an offense under I.C. 9-30-5-1 through 9-30-5-5 may not receive the benefit of pre-trial diversion. In addition, neither can an offense under those sections be reduced to reckless driving and then diverted.

Finally, I.C. 33-39-1-8, as amended, provides that a prosecutor who chooses to withhold prosecution under a pre-trial diversion program, "shall" transmit that information to the Prosecuting Attorneys Council in an electronic format. IPAC Executive Director Steve Johnson is currently working with ProsLink to develop the format by which such information may be transmitted on the ProsLink system. Prosecutors not on ProsLink will be required to find an alternative way to transmit the required information to IPAC electronically.



The Canal Walk
at the
Indiana Government Center
Indianapolis, Indiana

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**See You At The
2005 Summer Conference
July 6-8, 2005
Executive Inn**





Indiana

- **THE SUPREME COURT SPEAKS--EXCITED UTTERANCES DO NOT ALWAYS PASS THE CRAWFORD TEST**

Hammon v. State, ___N.E.2d___ (Ind. Ct. App. 6/16/05)

Last year, the Indiana Supreme Court granted transfer in Hershel Hammon's case. The Court of Appeals had affirmed the trial court's admission of testimony by a police officer during which he recounted the statements made to him by Hammon's wife, Amy. The trial court concluded that the wife's statements to the investigating officer were excited utterances and as such were admissible, even though Amy Hammon did not testify at trial. Prior to last year's United States Supreme Court *Crawford v. Washington* opinion that would have been the end of the discussion.

After Hammon was convicted, however, and while his case was pending before the Indiana Court of Appeals, the U.S. Supreme Court decided the *Crawford* case. It was necessary, therefore, for the Court of Appeals last year, and the Supreme Court last week, to apply the holding of *Crawford* to the facts presented by Hammon's case. *Crawford* made it clear that in a criminal prosecution, "testimonial" hearsay statements permitted under the rules of evidence must further be reviewed to determine whether the defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment has been satisfied. *Crawford* prohibits the use of testimonial statements unless the opportunity to cross-examine the declarant has been afforded. Therefore, the Supreme Court said last week, "no matter how firmly rooted the excited utterance exception is - if the statement is testimonial, it is admissible only if "the declarant is unavailable, and only when the defendant has had a prior opportunity to cross-examine." *Crawford* has made clear that confrontation, not reliability, is the key to this Sixth Amendment right.

After considering the views of the Indiana Court of Appeals, as well as the views of courts in other jurisdictions, the Indiana Supreme Court first concluded that "a testimonial statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." In making that determination, the motive of the questioner, and the declarant must be considered, the Court said. If either party to the conversation is principally motivated by a desire to preserve the statement, that is sufficient to render the statement testimonial and *Crawford* applies.

Secondly, in Hammon's case, the Supreme Court concluded that the victim's initial statements to the investigating officer

fell into a category the Court defined as "preliminary investigation." Finding that neither the officer nor Amy Hammons were motivated to preserve the victim's initial statements for later use in prosecuting Hammon, the statements were determined to be non-testimonial. The rules of evidence alone, therefore, determined their admissibility. The trial court did not err in admitting Amy's statements as excited utterances, the Court held.

The battery affidavit that the officers had Amy complete was a different story, however. Clearly, the principal reason for completion of the affidavit was to preserve Amy's story for use as evidence or for impeachment purposes at trial. The Court concluded that the officer's subjective purpose was not relevant. The fact that the officer was simply following prescribed procedure was also deemed irrelevant. The battery affidavit was determined to be testimonial in nature and its admission in evidence was error, the Court said.

In that Hammon was tried to the bench, the admission of the affidavit was deemed harmless error. If the case had been tried to a jury however, the Court warned, the affidavit would have significantly affected the ultimate conclusion of the trier-of-fact and would not have been held harmless.

- **LICENSE PLATE IMPROPERLY DISPLAYED**

Merritt v. State, ___N.E.2d___ (Ind. Sup. Ct. 6/17/05)

Last year, the Indiana Court of Appeals held that Jelani Merritt did not violate the statute dictating the proper method for displaying a license plate when he put his license plate inside the back window of the car he was driving. The Court of Appeals concluded, therefore, that the stop of Merritt's vehicle was not justified by reasonable, articulable suspicion and the drugs subsequently found in Merritt's car should have been suppressed. The Indiana Supreme Court granted transfer and earlier this month reversed the Court of Appeals. The Supreme Court held that a properly displayed license plate must be affixed to the brackets provided on the rear of a vehicle, and not in the rear window.

South Bend Police Officer James Andrews stopped Merritt's vehicle after he observed the car's license plate "stuck in the back window" rather than "affixed to the back of the vehicle with screws." I.C. 9-18-2-26 requires that a license plate be placed "upon" the rear of the vehicle. The Supreme Court concluded that the placement of a license plate on the *inside* of the back window clearly does not satisfy the requirement that license plates be displayed "*upon* the rear of the vehicle."

Recent Decisions Update (continued)

The Court held that the defendant's license plate inserted inside the back window of his automobile was not displayed appropriately. Therefore, the Supreme Court held, Officer Andrews' stop of Merritt's vehicle was proper and the trial court did not err in admitting evidence seized after the stop.

In order to prevent future uncertainty regarding the proper placement of vehicle license plates, the Supreme Court undertook clarification of the license plate display requirements of I.C. 9-18-2-26 in conjunction with the license plate illumination provisions of I.C. 9-19-6-4(e). Together, the Court said, "these provisions require that the license plate be displayed upon the rear of the vehicle, securely fastened, in a horizontal position, and also that the plate be illuminated at night by a separate white light so as to be clearly legible from fifty feet." "Any other method of license plate display may serve as a basis for reasonable suspicion for law enforcement officers to make a traffic stop to ascertain whether the display fully complies with all statutory requirements."

The Supreme Court held that the trial court did not err in admitting evidence resulting from the traffic stop of Merritt's vehicle. The judgment of the trial court was affirmed.

- **TRANSFER GRANTED—*DAVIDSON v. STATE***

In last month's *Indiana Prosecutor*, it was reported that the Indiana Court of Appeals had held in *Davidson v. State*, 825 N.E.2d 414, that Jason Davidson's constitutional rights included a

right to have every element of his offense proved beyond a reasonable doubt. This, the Court went on to say, included proof beyond a reasonable doubt of the voluntariness of Davidson's acts. The Court of Appeals did not buy the State's argument that Davidson had not raised voluntariness as an issue at trial in that he did not present evidence indicating that his actions were the result of convulsion, reflex or similar activity - truly involuntary actions. The Court of Appeals concluded that voluntariness is not limited to instances of convulsive or reflexive behavior. Davidson asserted at trial that he could not appreciate the wrongfulness of his conduct as a result of his ingestion of Zoloft and Ambien. The Court of Appeals found that Davidson had presented sufficient evidence to call his voluntariness into question.

The Court of Appeals held it reversible error that the final jury instructions in Davidson's case did not include voluntariness as an element of his crime; did not define voluntariness; and did not advise jurors that they had to find that the State had proven beyond a reasonable doubt that Davidson acted voluntarily. Davidson's murder conviction was reversed and his case remanded.

On June 1, 2005, the Indiana Supreme Court granted transfer in the *Davidson* case. The granting of transfer renders the Court of Appeals decision null and void.

